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Nos. 07-1466; 07-1467

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SUPREME COURT, U.S.

In The Supreme Court of the United States

SANDRA BRITTON, *et al.*,

Petitioners,

v.

BAYER CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO BAILEY AND ALBERTONI PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals' application of the due process standard for adequate notice relating to the dismissal of Petitioners' action warrants this Court's rare intervention when: (1) the Court of Appeals correctly stated the due process standard as declared in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); (2) the district court determined that the Petitioners actually received documents from the court, from defendants, and from Plaintiffs' Liaison Counsel, that should have apprised them of the progress of their case; and (3) the Court of Appeals held that notice was constitutionally adequate and the district court did not err in refusing to set aside the order of dismissal?

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are as follows:

Sandra Britton; Yolanda Wright; Marcy Albertoni; Linda Allen; Mike Bailey; Jerome Begay; Benjamin Benemon; Josie Blackwelder; Rickey Brannon; Mike Braxton; Laura L. Burns; Jackson Butler; Bessie Campbell; James Carter; Michael Clark; Edward Cole; Loretta Cook; Mary Sue Couch; Nona Daniels; George Defnall; Musa Doh; Mary Downing; Eddie I. Ellison; Joseph Ester; Carrie J. Faver; James Fields; Debbie Gaylord; Maybelle George; Michael Hale; Deborah Harris; Constance Harrison, Individually And As Next Friend of Savana Harrison, Minor; William A. Harvill; Guindell D. Hogan; Johnnie Huggins; Ronald Hyde; Nathaniel Ivey; Christine Jackson; Gloria Jackson; Judy Marie Jackson; Elizabeth Jinks; Gloria Johnson; Ruby Jones; American Kaylor; Debra Keith; Mary Lott; Terry McAlmont; Don McDaniel; Mary McDonald; William Miller; Mary E. Milligan-Nichols; Peggy Lynn Morris; Roy Wayne Morris; Nancy Murray; William R. Murtaugh; Rosie Mae Norris; Linda Ordonez; Daniel Otis; Robert Patino; Moises E. Perea; Diana Pharo; Dorthy Pilato; June Rhodes; Craig Riley; Alicia Rivers; Joe Roberson, Individually and as Representative of the Estate of Vickie Lynn Roberson, Deceased; Rosa L. Roberts, Individually And As Representative Of The Estate Of Evelyn P. Roberts, Deceased; Linda Guenther, Individually And As Representative of the Estate of Ida Rogue, Deceased; Betty C. Rosemond; Alma Rucker; Daniel Rushton; James A. Scales; Curley

Shealey; Leigh Strong; Tirsa Vazquez, Individually And As Representative Of The Estate of Alex Vazquez, Deceased; John Baines Walker; Pamela Walker; Benjamin Wells; Marjoriette Williams; Cassie Elaine Covington Williams; Thomas Willis; Desda Witcher; Clifford Woods; Lois Sutton; Willie Madison; Carl Powers; Toni Walker; Katherine Hutto; Barry Baxter; Eddie LeClair; Beverly Wilson; Alverta Hills; *Petitioners*.

Wyeth, Chattem, Inc., Hogil Pharmaceuticals Corp., Schering-Plough HealthCare Products, Inc., Chesebrough-Pond's, Inc., Pfizer, Inc. and Warner-Lambert Company, LLC, SmithKline Beecham Corp., The Procter & Gamble Company, Bristol-Myers Squibb Company, *Respondents*.

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

Wyeth, Chattem, Inc., Hogil Pharmaceuticals Corp., Schering-Plough HealthCare Products, Inc., Chesebrough-Pond's, Inc., Pfizer, Inc. and Warner-Lambert Company, LLC, SmithKline Beecham Corp., The Procter & Gamble Company, Bristol-Myers Squibb Company, *Appellees*.[1]

All petitioners here are Appellants below.

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[1] In the Appellees' Brief in the court below, Defendant-Appellees stated, "Plaintiffs never perfected service on all defendants. To the extent any defendant was not properly served, no defendant waives service by the filing of this Defendant-Appellee Joint Answering Brief."

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Wyeth f/k/a American Home Products Corporation ("AHPC"), on behalf of itself and its unincorporated division Wyeth Consumer Healthcare f/k/a Whitehall-Robins Healthcare (collectively "Wyeth")[2]:

> Respondent Wyeth is a publicly traded company. Wyeth does not have any parent corporations and no publicly held company owns ten percent (10%) or more of its outstanding shares.

Chattem, Inc.:

> Chattem, Inc. has no parent corporation and no publicly held corporation owns 10% or more of Chattem, Inc.'s stock.

Chesebrough-Pond's, Inc.:

> Chesebrough-Pond's Inc. merged with and into Conopco, Inc. on May 7, 2005 ("Conopco"). The parent corporation of Conopco is Unilever United States, Inc. No other company owns 10 percent or more of the stock of Conopco. The ultimate, indirect parent corporations of Conopco are Unilever NV and Unilever PLC, both of which are publicly traded, and no

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[2] A.H. Robins Company, Incorporated merged into AHPC on August 3, 1998, after which it ceased to exist as a separate entity.

company owns 10 percent or more of the stock of either corporation.

Hogil Pharmaceutical Corporation:

Hogil Pharmaceutical Corporation is a privately held corporation. Hogil Pharmaceutical Corporation does not have any parent corporations and no publicly held company owns 10 percent or more of its outstanding shares.

Pfizer Inc. and Warner-Lambert Company, LLC (incorrectly named in this action as "Pfizer" and"Warner-Lambert Company"):

Pfizer Inc. acquired 100% of Warner-Lambert Company, LLC's stock in June 2000. Pfizer Inc. has no publicly held corporate parents, affiliates and/or subsidiaries.

The Procter & Gamble Company:

The Procter & Gamble Company is a publicly traded company. The Procter & Gamble Company does not have any parent corporations and no publicly held company owns 10 percent or more of its outstanding shares.

Schering-Plough HealthCare Products, Inc.:

Schering-Plough HealthCare Products, Inc. ("SPHC") is a wholly owned subsidiary of Schering-Plough Corporation ("SPC"). SPC

has no parent corporation and no individual or corporation holds more than 10% or more of its stock.

SmithKline Beecham Corporation, Inc. d/b/a GlaxoSmithKline & Block Drug Company:

The parent corporation of SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK") is GlaxoSmithKline Holdings (Americas) Inc. No other company owns 10 percent or more of the stock of GSK. The ultimate, indirect parent corporation of GSK is GlaxoSmithKline plc. GlaxoSmithKline plc is publicly traded, and no company owns 10 percent or more of the stock of GlaxoSmithKline plc.

Bristol-Myers Squibb Company:

Bristol-Myers Squibb Company has no parent corporation. It is a publicly-held corporation, listed on the New York Stock Exchange.

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The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished and is reprinted in the Appendix to the Petition ("Pet. App.") at 1-7.

The opinion of the United States District Court for the District of Washington, denying Plaintiffs' Motion for Relief from Judgment, appears at Pet. App. at 8-13, and is unpublished. The opinion of the United States District Court for the District of Washington, dismissing the action, appears at Pet. App. at 14-35, and is unpublished.

JURISDICTION

The order of the United States Court of Appeals sought to be reviewed was entered on January 18, 2008. (Pet. App. at 1). The petition for rehearing was denied on February 22, 2008. (Pet. App. at 36). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time

of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Civil Procedure 60(b):

Rule 60. Relief from Judgment or Order

. . .

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

INTRODUCTION

Petitioners claim that the district court and Court of Appeals erred in refusing, under Rule 60(b)(4), to set aside the order dismissing their action as void due to a lack of due process. Specifically, Petitioners claim that they did not receive the district court's case management orders, the warnings from the district court that their cases would be dismissed for failure to comply, or the proposed order of dismissal. No reason exists for this Court to grant certiorari because whether or not Petitioners received these documents is an issue of fact, and there is no dispute that the Court of Appeals applied the proper due process standard. Furthermore, the Court of Appeals correctly applied the due process standard to determine that Petitioners received constitutionally adequate notice. Accordingly, certiorari should be denied.

STATEMENT OF THE CASE

Petitioners filed their joint, multi-plaintiff complaint in Mississippi state court in November 2002. At that time, Petitioners were represented by

two separate law firms: (1) Funches & Associates, and (2) the O'Quinn Law Firm. Mr. Catouche Body, a former attorney with Funches & Associates, was initially responsible for the day-to-day filings of the case and signed the Complaint. After removal, Petitioners' case was transferred to the United States District Court for the District of Washington, under an order of the Judicial Panel on Multidistrict Litigation ("MDL 1407"), where it was docketed on May 29, 2003.

The parties in the MDL submitted an agreed-upon Case Management Order ("CMO") 1, which set out basic procedures for MDL 1407. *Allen v. Bayer Corp. (In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.)*, 460 F.3d 1217, 1223 (9th Cir. 2006). This order provided that notice by the MDL Court to Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel of any matter or ruling relating to all actions would be considered notice to all MDL 1407 parties, and that service on Liaison Counsel would constitute service on all plaintiffs' and all defendants' counsel, respectively. *Id.*

A series of subsequent CMOs were entered. These CMOs applied to all PPA actions transferred to MDL 1407, and were posted on the court's public website. *Id.* at 1223-24. To address multi-plaintiff complaints, the MDL Court, with the cooperation of lead counsel for both plaintiffs and defendants, issued CMO 15 on May 29, 2003. (Pet. App. at 14-15). CMO 15 required all plaintiffs in multi-plaintiff cases to file individual, severed complaints within 30 days of its entry or, for subsequently filed cases, within 30 days of the MDL docketing date. (*Id.* at

15). The district court also issued CMO 15A, which supplemented CMO 15 and provided for dismissal with prejudice of all jointly-filed complaints as of the effective date of the order (August 26, 2003). (*Id.*). Lance Palmer, Plaintiffs' Liaison Counsel, forwarded to Petitioners' counsel a copy of CMO 15 and 15A. (*Id.* at 11). Defense counsel also mailed a copy of CMO 15 to Petitioners' counsel. (*Id.*)

On July 31, 2003, the district court held a status conference and expressly advised plaintiffs that it would dismiss cases for failing to comply with CMO 15. *In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d at 1225-26. The court also issued a Minute Order confirming this warning. *Id.* at 1226. This Minute Order was posted on the district court's electronic docketing system and on the court's public website. *Id.* Plaintiffs' Liaison Counsel forwarded a copy of this Minute Order to Petitioners' counsel.

On October 30, 2003, the district court entered an order directing defendants to submit a proposed order of dismissal listing all cases in which plaintiffs filed untimely new individual complaints. (Pet. App. at 16). Plaintiffs' Liaison Counsel forwarded a copy of this order to Petitioners' counsel. In compliance with the district court's order, defense counsel submitted two proposed orders of dismissal. (*Id.*) The first proposed order was e-mailed to Mr. Catouche Body and the second proposed order was served on Mr. Funches at Funches & Associates. Petitioners never opposed those proposed orders.

On May 7, 2004, the district court acted upon the proposed orders, dismissing the *Britton* multi-plaintiff complaint as well as all individual Petitioners because they failed to serve individual amended complaints. (Pet. App. at 14-35). Petitioners did not move for reconsideration of the dismissal, nor did they appeal the order.

On March 3, 2006 – nearly two years after the dismissal – Petitioners filed a Motion for Relief from Judgment. The district court held that the Petitioners' almost two-year delay before filing a motion for relief was unreasonable, and denied the motion as untimely. (Pet. App. at 10-12). The district court also determined that the Petitioners' attorneys were receiving documents from the court, the defendants, and from Plaintiffs' Liaison Counsel that "should have apprised them of the progress of their case." (*Id.* at 11).

Petitioners appealed the district court's decision to the Ninth Circuit Court of Appeals. The Ninth Circuit reviewed *de novo* Petitioners' motion for Rule 60(b)(4) relief on the ground that the district court's order was void. (Pet. App. at 4). The Ninth Circuit determined that "good faith and reasoned efforts" were made to notify the Petitioners of their obligations under the district court's CMOs, that the district court found that Petitioners' counsel actually received documents from the court, and that Petitioners did not make any reasonable effort to remain apprised of the status of their case. (*Id.* at 6-7). Therefore, the Ninth Circuit held that notice was constitutionally adequate and affirmed the district court's refusal to set aside the order of dismissal.

(*Id.* at 7). The Ninth Circuit also observed that the district court did not abuse its discretion in finding that the two-year delay in seeking relief from the order was unreasonable, particularly since "the district court found that counsel did not fulfill their obligation to ensure that the court had the correct counsel listing and address and, given the lack of activity in the case, unreasonably failed to monitor the electronic docket." (*Id.* at 5).

Petitioners subsequently filed petitions for rehearing, which were denied. (Pet. App. at 36).

Petitioners now seek a writ of certiorari from the United States Supreme Court.

REASONS FOR DENYING THE PETITION

This case does not present any reason warranting the Court's review. Petitioners do not claim that the Ninth Circuit entered a decision in conflict with the decision of another United States court of appeals or a state court of last resort. There is also no important question at issue. Rather, the sole question presented by Petitioners is whether they received sufficient notice of certain case management orders, the motion to dismiss, and the order of dismissal that disposed of their lawsuit. (Pet. at i). In other words, Petitioners only claim is that both the district court and the Ninth Circuit were wrong in their application of law. This is neither an appropriate issue for certiorari nor correct as a matter of law. Accordingly, certiorari should be denied.

I. Certiorari Should be Denied Because Whether or Not Petitioners Received Documents is an Issue of Fact, and There is no Dispute that the Court of Appeals Applied the Proper Due Process Standard.

A. Whether or not Petitioners received documents is an issue of fact that does not warrant review.

The primary basis of Petitioners' writ is their claim that because the MDL docket sheet purportedly showed the incorrect attorney and the incorrect address, the lead attorney in the *Britton* case never received CMO 15 or the motion to dismiss, and did not timely receive the dismissal order. (*E.g.*, Pet. at 5-6). Therefore, Petitioners claim, the dismissal order was void due to a lack of due process, and should have been set aside under Rule 60(b)(4).

However, after reviewing the evidence, the district court rejected Petitioners' factual assertions, and determined that Petitioners' attorneys "were in fact receiving documents from the court, from defendants, and from plaintiffs' liaison counsel, that should have apprised them of the progress of their case." (Pet. App. at 11). For example, the district court cited evidence that Petitioners' attorneys were sent the district court's orders, including CMO 15, and a letter, which included a copy of CMO 15, outlining the obligations of that order. (*Id.*) The Ninth Circuit affirmed the district court's finding. (Pet. App. at 6-7) (noting that "the district court

found that counsel was in fact receiving documents from the court that should have apprised them of the status of the proceedings").

This finding is a pure issue of fact that disposes of Petitioners' argument that they never received any documents apprising them of the status of their case, and there is simply no reason to review it. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . .").

Furthermore, this issue of fact applies to this case and this case alone. If, as Petitioners claim, the wrong attorney was listed on the MDL docket sheet along with the address of that attorney's grandmother, this is clearly such an unusual or unique circumstance that any ruling on these facts would be inapplicable to other cases claiming a lack of due process. Moreover, Ninth Circuit Rule 36-3 provides that unpublished decisions of the Ninth Circuit – such as that at issue here – "are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Therefore, the decision of the Ninth Circuit in this case will have little, if any, effect on

future cases within the Ninth Circuit or any other circuit.[3]

B. Any alleged misapplication of a "properly stated rule of law" does not warrant review.

It is indisputable that the Ninth Circuit properly stated the standard that courts of appeal must follow when determining whether due process was satisfied. Specifically, the Ninth Circuit stated:

> Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

(Pet. App. at 6). Petitioners do not, and cannot, claim that the Ninth Circuit stated the incorrect

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[3] Notably, Petitioners attempt to elevate the importance of this case to overcome the lack of certworthiness by arguing that there are "thousands" of other plaintiffs in MDL 1407 that face the same inadequate due process standards and the same threat of dismissal in the future. (Pet. at 11). As discussed above, however, the facts of this case are novel and unique. Moreover, according to the Judicial Panel of Multidistrict Litigation, there were only 209 cases remaining in the PPA MDL as of September 2007. *See* United States Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation 2007 at 59, available at http://www.jpml.uscourts.gov/General_Info/Statistics/statistics.html. This is hardly the purported "multitudes" or "thousands" of plaintiffs that Petitioners would have this Court believe.

standard for due process. In fact, Petitioners' question presented cites this very same standard. (Pet. at i). Therefore, Petitioners' only possible complaint is that the Ninth Circuit somehow misapplied this standard, which is an issue generally inappropriate for review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). This is not one of those rare cases sufficient to overcome this general rule because the Ninth Circuit's decision is not in conflict with the decision of another United States court of appeals or a state court of last resort, there is no important question at issue, and this case presents novel and unique facts that are inapplicable to any future case in either the Ninth Circuit or any other circuit.

II. The District Court and the Ninth Circuit Correctly Determined that Petitioners Received Constitutionally Adequate Notice.

Petitioners claim that the Ninth Circuit's decision "so far departed from the accepted and usual course of judicial proceedings – and sanctioned just such a departure by the district court – as to call for an exercise of this Court's supervisory power." (Pet. at 11). This position is unsupportable because the district court correctly evaluated the evidence to determine that the Petitioners' attorneys received documents sufficient to put them on notice as to the status of the proceedings, and the Ninth Circuit correctly applied the due process standard to

determine that Petitioners received constitutionally adequate notice.

A. The evidence establishes that Petitioners received documents from the district court, defendants, and Plaintiffs' Liaison Counsel.

The district court properly determined that Petitioners' attorneys "were in fact receiving documents from the court, from defendants, and from plaintiffs' liaison counsel, that should have apprised them of the progress of their case." (Pet. App. at 11). The Ninth Circuit, holding that constitutionally adequate notice was provided, also noted that the "district court found that counsel was in fact receiving documents from the court that should have apprised them of the status of the proceedings." (Pet. App. at 6-7). This factual finding was correct in light of the evidence presented in this case.

The district court's CMO 1 provided that service was complete upon providing documents affecting all cases to Plaintiffs' Liaison Counsel and Defense Liaison Counsel. Pursuant to that CMO, all CMOs were served upon Petitioners once they were provided to Plaintiffs' Liaison Counsel. Plaintiffs' Liaison Counsel submitted an affidavit stating that he mailed to Mr. Funches, with Funches & Associates, at the correct address, all of the district court's CMOs and orders applicable to all cases. Therefore, Plaintiffs' Liaison Counsel averred that he mailed to Petitioners' counsel: (1) CMO 15 and 15A (which Petitioners claim to have never received),

(2) a Minute Order confirming the district court's warning that it would dismiss cases for failure to comply with CMO 15, and (3) an order directing defendants to submit a proposed order of dismissal listing all cases in which plaintiffs had failed to comply with CMO 15. (*See* Pet. App. at 11). Defense counsel also mailed a letter to Mr. Funches, along with a copy of CMO 15, outlining the obligations of that order. (*See id.*) Finally, the certificate of service for the proposed order of dismissal that included Petitioners' case demonstrated that Mr. Funches was properly served with a copy of that order.

Given all of this evidence, the district court – as affirmed by the Ninth Circuit – properly concluded that Petitioners' counsel received documents "that should have apprised them of the progress of their case." (Pet. App. at 11).

Despite all of these documents that were mailed to Petitioners' counsel, Petitioners ask this Court to believe that the dismissal order was entered in violation of due process because they did not receive actual notice of the "critical CMOs, the motion to dismiss, and the dismissal order itself." (Pet. at 8, 10). Petitioners' sole basis for their argument is that the MDL docket sheet did not show Mr. Delano Funches, but rather, showed Mr. Catouche Body – an associate who worked for Mr. Funches. (*Id.* at 4-5). Thus, Petitioners' claim, Mr. Funches did not receive the relevant documents.

Even if, as Petitioners' claim, the MDL docket sheet listed the wrong attorney and the wrong

address, the evidence established – as properly concluded by the district court – that Petitioners' counsel did receive the appropriate documents. Petitioners' attempt to focus this Court on the docket sheet misrepresents and distorts the pertinent facts. For example, Petitioners assert that because Mr. Funches did not receive CMO 15, they could not comply with the district court's order. (Pet. at 5). However, Petitioners fail to inform this Court that Plaintiffs' Liaison Counsel averred that he mailed to Mr. Funches at the correct address a copy of CMO 15. (*See* Pet. App. at 11). In addition, Petitioners fail to point out that the certificate of service on the second proposed order of dismissal, which included all of the *Britton* plaintiffs, indicates that Mr. Funches was properly served with that document via United States mail on December 8, 2003. Moreover, Petitioners do not explain how a number of petitioners complied with a different CMO by filling out and serving plaintiff fact sheets if they never received any documents from the court. (*See* Pet. App. at 11). Also notably absent from Petitioners' purported recitation of the facts is any explanation of who provided the address and attorney's name that was included on the docket sheet, how Petitioners purportedly learned of the dismissal of their action, and why Petitioners or their counsel failed to make any efforts to remain apprised of their case. (*See* Pet. App. at 7) (noting that "[t]here is nothing to indicate that the *Britton* Plaintiffs or any of their representatives made reasonable efforts to remain apprised of the status of the case").

As properly determined by the district court and affirmed by the Ninth Circuit, Petitioners received documents sufficient to provide notice of the CMOs, the proposed dismissal, and the subsequent dismissal of their action.

B. The Ninth Circuit correctly applied the due process standard to determine that Petitioners received constitutionally adequate notice.

The Ninth Circuit carefully considered and correctly applied this Court's holdings in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Jones v. Flowers*, 547 U.S. 220 (2006). The Ninth Circuit also properly considered prior case law within the circuit, and noted that "[t]he adequacy of notice depends upon the factual context in which it is given." (Pet. App. at 6) (citing *Owens-Corning Fiberglas Corp. v. Ctr. Wholesale, Inc. (In re Ctr. Wholesale, Inc.)*, 759 F.2d 1440, 1448 (9th Cir. 1985)). Under these standards, the Ninth Circuit correctly analyzed the facts as determined by the district court and the evidence, and found that "good faith and reasoned efforts" were "made to notify the *Britton* Plaintiffs of their obligations and their obligations under the case management orders and the consequences of not complying." (Pet. App. at 6). Therefore, the Ninth Circuit held that Petitioners received "constitutionally adequate" notice and the dismissal order was not void under Rule 60(b)(4). (*Id.* at 7).

This Court has declared that notice is constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent. *Mullane*, 339 U.S. at 314; *Jones*, 547 U.S. at 226. As explained above, the evidence establishes that Petitioners were mailed numerous documents, including the district court's orders, warnings from the district court that cases would be dismissed for failure to comply with those orders, and the proposal order of dismissal. Petitioners cannot seriously contend that the mailing of all of these documents to Mr. Funches – at the correct address – did not satisfy due process. *See Mullane*, 339 U.S. at 319 ("the mails today are recognized as an efficient and inexpensive means of communication."); *Hagner v. United States*, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed."). Furthermore, the Ninth Circuit has held that to rebut this presumption, something more than a declaration of non-receipt is required. *See Herndon v. De la Cruz (In re De la Cruz)*, 176 B.R. 19, 22 (B.A.P. 9th Cir. 1994).

Therefore, the Ninth Circuit's finding that "good faith and reasoned efforts" were made to notify the Petitioners of their obligations and the consequences of not complying, Pet. App. at 6, is in accordance with the principles set forth by this Court and other decisions within the Ninth Circuit. In contrast to Petitioners' claim, the Ninth Circuit did not depart from the principles set forth in the

Mullane line of authority or sanction such a departure by the district court.[4]

CONCLUSION

For the above and foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

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[4] Petitioners cite a number of cases that are inapposite. For example, Petitioners rely heavily on *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). In *Mennonite*, the county government initiated proceedings to sell the owner's property for nonpayment of taxes. It posted and published an announcement of the tax sale and mailed notice to the owner. Neither the county nor the owner informed the mortgagee of the pending tax sale, and the property was sold. *Id.* at 794. The court held that notice by publication and mailed notice to the property owner could not be expected to lead to actual notice to the mortgagee, and therefore, the notice was insufficient to meet due process requirements. *Id.* at 799-800. In contrast to *Mennonite*, Petitioners instituted their lawsuit and knew that they had a lawsuit pending. Petitioners were properly mailed copies of all of the district courts CMOs, the district court's warnings that a failure to comply with CMO 15 would result in dismissal, and a copy of the proposed dismissal order. This is simply not a case where no notice was sent to a party who had no knowledge that the underlying action was underway.

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